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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

April 12, 2001

Magalie Roman Salas, Esquire
Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-B204
Washington, D.C. 20554

Re: MM Docket No. 00-138
RM-9896
Boca Raton, Florida

Dear Ms. Salas:

Transmitted herewith, on behalf of Guenter Marksteiner, are an original and four copies of his "Response to Reply to Comments in Opposition to Letter Request" in the above-referenced proceeding.

Should any questions arise concerning this matter, please communicate with this office.

Very truly yours,



Anne Goodwin Crump
Counsel for Guenter Marksteiner

Enclosures

AGC:pjp

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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APR 12 2001

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

In the Matter of)	
)	
Amendment of Section 73.622(b),)	MM Docket No. 00-138
Table of Allotments,)	RM-9896
Digital Television Broadcast Stations.)	
(Boca Raton, Florida))	

Directed to: Chief, Video Services Division

RESPONSE TO REPLY TO COMMENTS IN OPPOSITION TO LETTER REQUEST

Guenter Marksteiner ("Marksteiner"), by his attorneys, hereby respectfully submits his Response to the "Reply to Comments in Opposition to Letter Request" ("Reply") submitted by the School Board of Broward County ("School Board") on March 30, 2001. Such a Response is necessary in order to correct factual and legal errors contained in the School Board's Reply.¹

With respect thereto, the following is stated:

1. As previously set forth in Marksteiner's "Comments in Opposition to Letter Request," the School Board acquired the authorization for WPPB-TV, Boca Raton, Florida, from Channel 63 of Palm Beach, Inc. ("Channel 63"), which had in turn acquired the station's authorization from Palmetto Broadcasters Associated for Communities, Inc. ("Palmetto"). At that time, the School Board also assumed and agreed to be bound by the terms of a Settlement Agreement among Marksteiner, Palmetto, and Channel 63. The Petition for Rule Making which commenced

¹ In light of the informal nature of the School Board's request, Marksteiner is unaware of any procedural restrictions against the filing of this Response, but, to the extent deemed necessary, Marksteiner hereby requests that this Response be accepted in order to correct the errors noted.

this proceeding was submitted pursuant to, and in furtherance of, that Settlement Agreement. By its letter request of February 26, 2001, however, the School Board has sought to withdraw that Petition, and the request for approval of the Settlement Agreement. By separate letter to the parties, the School Board also has attempted to terminate the Settlement Agreement. The fact remains, however, that at the time of the School Board's letters, the Commission had already approved the Settlement Agreement, that approval had long ago become final, and the approval had been granted within the time specified by the Settlement Agreement. Thus, the School Board has no basis on which it can terminate the Settlement Agreement.

2. In its Reply, however, the School Board has again raised its claim that the Commission did not "grant" the Settlement Agreement. This notion remains nothing more than a vain attempt by the School Board to clutch at straws. Review of the letter of the Chief, Television Branch, dated March 31, 2000, Reference 1800E3-JLB, shows that the Commission's staff explicitly found that "the Joint Request for Approval of Settlement is consistent with the Commission's rules and policies and will serve the public interest." Moreover, the letter approving the Settlement Agreement also took actions in furtherance of that agreement, such as dismissal of pending pleadings and grant of consent to assignment of the WPPB-TV authorization to Channel 63. Thus, while the Commission did not use the words "grant this Settlement Agreement," it cannot be disputed that the Commission did, in fact, consider and grant its approval of the Settlement Agreement. The School Board is therefore left to argue that granting approval of a Settlement Agreement is not the same thing as "granting" a Settlement Agreement. Such an argument is clearly untenable and is of the type which casts disrepute upon the legal profession. Accordingly, there is no basis upon which the School Board can terminate

the Settlement Agreement.

3. Moreover, the significance of the Commission's approval of the Settlement Agreement must be kept in mind. The School Board's predecessor-in-interest made specific representations to the Commission in connection with the Settlement Agreement. Included among those representations was the fact, as set forth in Paragraph 11 of the Settlement Agreement, that all transferees, successors, and assigns of the parties would also be legally bound by the agreement. As set forth in Marksteiner's Comments in Opposition, the School Board affirmatively assumed and agreed to be bound by the Settlement Agreement when it entered into an "Assignment and Assumption of Contracts Agreement" at the time of acquiring WPPB-TV. The School Board thus now stands in the shoes of Channel 63 as a party to the Settlement Agreement.

4. Subsequent to receiving and considering the representations made by the parties, the Commission's staff took action in reliance upon those representations. Included among those actions was approval of the assignment of the WPPB-TV authorization to Channel 63, an action without which the School Board could not have acquired the license from Channel 63. Furthermore, the application for consent to assignment of the WPPB-TV authorization to the School Board included a copy of the contract between the parties, and that contract explicitly stated that the School Board would assume and be bound by the Settlement Agreement. Thus, the School Board itself made an explicit representation to the Commission that it would adhere to the Settlement Agreement, and that representation necessarily was considered as a part of the Commission's determination that the grant of the assignment application would serve the public interest. The instant rule making proceeding also was commenced in furtherance of the

Settlement Agreement, as the proposed change in the DTV channel assigned to WPPB-TV was an integral part of that agreement. Now that the Commission has acted based upon the representations of the parties, the School Board cannot unilaterally go back and withdraw the representations which provided the basis for the Commission's actions.

5. The School Board has pointed to the Commission's policy of not becoming involved in private contractual disputes. Marksteiner does not contest the validity of such a policy, but it is simply inapplicable in the instant case. As set forth above, the situation is such that the Commission already is inextricably involved. In the instant case, the parties to the Settlement Agreement presented to the Commission a plan of action to resolve ongoing disputes before the Commission and affirmatively indicated their intent to go forward with that plan. Based upon the parties' representations, the Commission approved the plan set forth in the Settlement Agreement and took steps to implement that plan. Additionally, the Commission granted the assignment application whereby the School Board acquired the license based upon representations which included a commitment by the School Board to go forward with the Settlement Agreement. It must therefore be a matter of grave concern to the Commission for a party at this late date to go back and attempt to withdraw the representations which formed the basis for the Commission's actions in the first instance. While the School Board was not initially a party to the Settlement Agreement, it has become a party through assignment of the agreement. Effectively, then, a party has told the Commission one thing in order to obtain the desired grants of assignment applications and then has told the Commission something else after its desired results were achieved. Such abusive behavior cannot be tolerated.

6. Furthermore, the School Board has provided no rational basis whatsoever for its

purported withdrawal of the proposed change in DTV Channel from Channel *44 to Channel *40. While it initially offered no reason at all for the withdrawal, in its Reply, the School Board makes a vague allusion to the possibility of prohibited contour overlap with WJAN-CA on adjacent Channel 41 in Miami. The School Board itself, however, has previously taken the opposite view. In the "Joint Response to Supplemental Reply Comments," submitted by Marksteiner and the School Board on December 21, 2000, in the instant rule making proceeding, it was demonstrated that there is no concern in this regard. That Joint Response, to which the School Board was a signatory, noted that it had previously been demonstrated that the proposed operation of WPPB-TV would not increase the predicted interference to WJAN-CA and that the predicted interference to WJAN-CA from the proposed reallocation would affect only 0.03 percent of WJAN-CA's service area population, which is substantially less than the Commission's rounding tolerance. Furthermore, the Joint Response showed that there is less potential for interference on Channel *40 than would be the case on Channel *44.

7. Once again, the School Board has made an abrupt about-face without explanation and has repudiated representations previously made by it to the Commission. It should be noted that the change in course came only two months after its submission supporting the proposed reallocation. One can only speculate as to what might lie behind this sudden change of heart. The School Board has not even acknowledged this reversal, much less explained why it has suddenly switched from vigorously supporting the proposed reallocation to seeking to terminate the proceeding. The School Board previously has participated in demonstrating that the proposed reallocation would serve the public interest and has urged the Commission to go forward with its adoption. The School Board cannot now be heard to claim, without explanation, that the

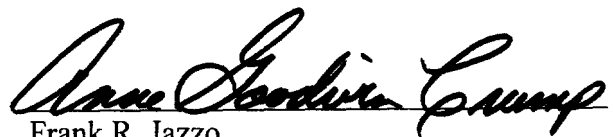
opposite course of action would serve the public interest. In fact, it is clear that the public interest would best be served by adoption of the proposed change in DTV channel for WPPB-TV. The benefits flowing from the Settlement Agreement would be realized, and WPPB-TV's change to DTV Channel *40 would allow WHDT-LP to provide digital service on Channel 44. This addition of another digital station to the market would materially assist in the transition to DTV by making more digital programming available.

WHEREFORE, the premises considered, Marksteiner requests that the School Board's letter be rejected and that the substitution of DTV Channel *40 for DTV Channel *44 be adopted as set forth in the *Notice of Proposed Rule Making*, DA 00-1797, released August 18, 2000, in the instant proceeding.

Respectfully submitted,

GUENTER MARKSTEINER

By:



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April 12, 2001

agc/#139/resprep.gm

CERTIFICATE OF SERVICE

I, Pamela J. Parks, hereby certify that a true copy of the foregoing “”Response To Reply To Comments In Opposition To Letter Request” were served by first-class mail, postage pre-paid, this 12th day of April, 2001 to:

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